79-202

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1978.

NO.

PATRICIA BOWDEN, EURINA BOWDEN,
AND JAMIL BOWDEN,
PETITIONERS,

v.

DENNIS McKENNA AND
EDWARD HOLLAND,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Petitioners, Patricia, Eurina, and Jamil Bowden, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on May 9, 1979.[1]

Citations to Opinions Below.

The opinion of the Court of Appeals, reprinted in Appendix A hereto, is unreported as yet. The judgment of the Court of Appeals is reprinted as Appendix B hereto. Plaintiffs' Motion

[1] Petitioners, respectively, are the surviving widow individually and as Administratrix of the Estate of James Bowden, deceased, and two minor children.

to Clarify Judgment filed May 14, 1979 is reprinted in Appendix C hereto. Response to Plaintiffs' Motion to Clarify Judgment entered May 15, 1979 is reprinted in Appendix D hereto. No opinion was rendered by the District Court.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Whether in a Civil Rights Action (42 U.S.C. § 1983) for the killing of a black robbery suspect by white police officers, due process standards of reliability governing the admissibility of eyewitness identification evidence should apply?

2. Whether the standard of review that is to be applied to discretionary rulings of a trial court concerning the exclusion of relevant evidence on the grounds of unfair prejudice pursuant to Fed. R. Evid. 403 should be based upon a determination of whether the trial court acted "arbitrarily or irrationally"?

3. Whether the court below failed to apply any cognizable standard of review of the trial court's discretionary ruling to exclude evidence pursuant to Fed. R. Evid. 403 and impermissibly substituted its discretion for that of the trial court leading to an erroneous reversal?

4. Whether claimed prejudicial remarks of petitioners' counsel during summation were sufficient to warrant reversal when viewed in the context of the entire trial of a Civil Rights Action (42 U.S.C. § 1983) for the killing of a black robbery suspect by white police officers?

Statutes Involved.

28 U.S.C. Federal Rules of Evidence Rule 403:
Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

42 U.S.C. § 1983:
Civil Action for Deprivation of Rights

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Amendment 14, Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. Federal Rules of Civil Procedure Rule 61:
Harmless Error

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Statement of the Case.

Petitioners brought this action for damages in behalf of their decedent, alleging violations of Fourteenth Amendment rights under the Civil Rights Act, 42 U.S.C. §§ 1981, 1983, 1985 and 1988 with pendent state claims under the Massachusetts Wrongful Death Statute, G.L. c. 229, § 2. The jurisdiction of the United States District Court for the District of Massachusetts was invoked pursuant to 28 U.S.C. §§ 1343 (damage recovery for deprivation of civil rights) and 1331 (general federal question jurisdiction). The action arose out of the shooting death of petitioners' decedent by the respondent police officers. After a trial before the Honorable Walter Jay Skinner and a jury wherein the respondents came forward with affirmative defenses of self-defense, defense of another and exercise of legal duty to affect an arrest, the jury returned a verdict for the petitioners of Two Hundred Forty Thousand ($240,000.00) Dollars in compensatory damages under the Civil Rights Act and Ten Thousand ($10,000.00) Dollars in punitive damages. Under the Massachusetts Wrongful Death Act the jury returned a separate verdict for the petitioners of Two Hundred Forty Thousand ($240,000.00) Dollars in compensatory damages and Ten

Thousand ($10,000.00) Dollars in punitive damages. Judgment was entered March 1, 1978. The court below subsequently vacated judgment and remanded for a new trial (Appendix B).

The pertinent facts are summarized from the record of the proceedings below:

On the evening of January 29, 1975, the respondents, while acting in their official capacity as Tactical Patrol Force Officers of the City of Boston Police Department, alighted from an unmarked police car with drawn guns (R. 10 David O'Brian testimony) and wearing civilian clothes approached a car containing the petitioners' decedent, James Bowden (hereinafter referred to as Bowden), a black man 25 years of age living at the time with his wife and two minor children. Bowden, a man with no criminal record (Pl. Ex. 9B; p. 26) had been continuously employed as a maintenance worker at the Boston City Hospital from the age of seventeen. The respondents were attracted to Bowden's automobile because the registration number of Bowden's automobile was similar to (Pl. Ex. 149; R. 2-121), but as it later turned out, different from the registration number of an automobile reportedly used in the holdup of a small grocery store some four hours earlier in the adjoining City of Cambridge (Pl. Ex. 22A; R. 46). According to the testimony of two newspaper reporters accompanying the respondents (R. 13 David O'Brian testimony; R. 88), within three to five seconds after having alighted from their car, the respondents, with the express intention of killing Bowden, jointly fired at him inflicting mortal wounds (R. 7-7). Respondents testified that Bowden had attempted to shoot them and run them down with his car in a series of rapid forward and backward maneuvers causing the engine to race and the tires to screech on the pavement (R. 4-62, 109, 135; 6-63-65, 69, 75). No engine noise or tire screeching was heard by the newspaper reporters who were

at the scene (R. 13 David O'Brian testimony; R. 86). Neither did the reporters see the respondents display their badges nor hear the respondents announce that they were police officers as respondents testified they had done several times before firing (R. 13, 24 David O'Brian testimony; R. 86). Respondents' testimony was corroborated only by the admission into evidence of a handgun allegedly found by police some distance from the shooting scene later in the evening. It is undisputed that the gun found near the shooting scene was not used in the Cambridge robbery. Likewise it is undisputed that the gun found near the scene was an automatic pistol which ejects a shell casing when fired. The evidence revealed that all of Bowden's car windows were closed when he is alleged to have fired at the respondents. No spent shell casings were found in Bowden's car or near the scene after an extensive examination by a ballistics expert and others (R. 34, 47, 48 Walter Logue testimony). Analysis of the gun revealed no fingerprints (R. 51, 52 Walter Logue testimony). There was no evidence of any paraffin test done on Bowden's hands. Implicit in the jury's verdict was that the gun was either planted by police or had no connection with the case. During the seven day trial wherein testimony of thirty witnesses was received, the record amply reflects that the respondents' testimony was overwhelmingly contradicted by crushing independent evidence of liability as well as by evidence elicited from respondents on cross-examination, much of which cannot be recounted herein in the interests of brevity.

At trial, respondents sought to introduce as evidence the identification of Bowden by two storekeepers as one of a pair of robbers of the Cambridge store. Respondents argued that the identification testimony was admissible as circumstantial evidence of Bowden's motive in resisting the respondents as well as circumstantial evidence as to Bowden's being the first

aggressor. Petitioners objected and moved for exclusion of the evidence of identification on the grounds that pursuant to Fed. R. Evid. 403 the probative value of said evidence was substantially outweighed by the danger of unfair prejudice and also that said evidence violated due process standards of reliability (R. 6-7, 26). During an extensive hearing without the jury, the parties agreed that the trial judge could rely on pre-trial depositions of the storekeepers in lieu of voir dire. After considering the depositions, the court excluded the identification evidence on the grounds advanced by the petitioners (R. 6-55).

In support of its ruling the trial court found that the circumstances of the identification of Bowden were highly suspect (R. 6-6). Further, the trial court found that there was utterly no objective corroboration of the identification evidence other than the fact that Bowden and the robbers were all black (R. 6-19, 20, 43) and, moreover, that the identification in terms of height and weight did not even come close to Bowden's actual physical dimensions (R. 6-4, 11, 32).

Among the more critical of the specific facts carefully weighed by the court in making its ruling to exclude the eyewitness identification evidence that were set forth on the record are the following:

The storekeepers described both of the robbers as being tall and thin. However, autopsy evidence revealed that Bowden was short and fat, measuring 64.5 inches in height and weighing an estimated 180 pounds (R. 6-12, 13, 32). The court viewed morgue photographs (Pl. Ex. 12A, 12B; R. 2-50) of Bowden and concluded that he was quite heavy in build (R. 6-22, 32). The robbers wore caps, light jackets and sneakers, items which cannot conceal bulk or create the illusion of height (Pl. Ex. 22A; R. 46). Prior to being brought to the mortuary by police on the evening of the shooting to attempt an identification of Bowden, not only was one of the store-

keepers, Desmond Callahan, told by police that the man whom they wanted him to identify was the man who had robbed his store and that he had been shot by police in the car that Callahan had seen with the same registration number on it that he had reported immediately after the robbery, but also Callahan actually met both of the respondents who told him that they were the officers who had shot Bowden after Bowden had attempted to kill them by shooting at them and trying to run them down with his car (Pl. Ex. B; p. 59-63, 70). Despite this prejudicial briefing prior to viewing Bowden's body, Callahan was unable to make an identification of Bowden even after having viewed the body for a half hour. In explaining his failure to identify Bowden in his deposition, Callahan stated that the corpse was "bloated" and that the lighting conditions were not sufficient (Pl. Ex. B; p. 65-68). The medical examiner testified at trial that the body was not in any way bloated and the lighting conditions were adequate for the purposes (although someone who thought Bowden had been thin while alive might so describe his 180 pound body on a frame 5 feet 4½ inches in height) of identification (R. 2-54, 55). The next day, Callahan was again brought to the mortuary by the police, this time in the company of his employer, the store owner. The owner, Ethel Caragianes, identified Bowden as being one of the robbers after a conversation with police and after reading a newspaper account of the respondents' version of the shooting incident wherein it stated that Bowden tried to run the officers down with his car (Pl. Ex. A; p. 32, 37, 90). After again viewing Bowden's body, this time in the company of his employer, Callahan identified Bowden as one of the robbers. With the exception of dungaree pants, none of Bowden's clothing matched the clothing reportedly worn by the robbers (Pl. Ex. B; p. 32; Pl. Ex. 22A; R. 46). Likewise, there were significant inconsistencies con-

cerning the general description and the registration number of the getaway car and Bowden's car (Pl. Ex. B; p. 50-53).

In an attempt to identify the second robber Callahan and Caragianes selected mug photographs of three other men. Despite the fact that both had previously reported that the robbers were black, Caragianes selected the photograph of a white man. Callahan picked out a photograph of a black man. The two ultimately agreed on the selection of a third photograph, that of a black man. None of the individuals pictured has ever been charged in connection with the Cambridge robbery. The individual whose photograph both storekeepers agreed upon was serving a sentence in a maximum security prison and was not on any type of furlough or work release program on the day of the robbery (R. 6-10, 11).

Reasons for Granting the Writ.

I.

IN A CIVIL RIGHTS ACTION (42 U.S.C. § 1983) FOR THE KILLING OF A BLACK ROBBERY SUSPECT BY WHITE POLICE OFFICERS DUE PROCESS STANDARDS OF RELIABILITY GOVERNING THE ADMISSIBILITY OF EYEWITNESS IDENTIFICATION EVIDENCE SHOULD APPLY.

Petitioners brought this action for damages alleging that plaintiffs' decedent was deprived of his constitutional right to life without due process of law secured to him by the Fourteenth Amendment.

At trial, petitioners moved for the exclusion of certain evidence of eyewitness identification of plaintiffs' decedent as being a participant in a robbery on grounds, *inter alia*, that due process standards of reliability were violated (R. 6-7). The court allowed petitioners' motion and, after a verdict for the petitioners, the respondents appealed.

The United States Court of Appeals for the First Circuit reversed and remanded the case for a new trial on the

ground, among others, that due process standards of reliability governing the admissibility of eyewitness identifications in criminal prosecutions should not have been applied to a civil case (Appendix A at 37).

Petitioners contend that this is no mere civil case. This is not the slip-of-the-hand variety of negligence. The issue here is not whose automobile arrived at an intersection first. This is a peculiar species of tort, a constitutional tort. It is because petitioners allege that their decedent was victimized by the abuse of governmental power that the tort attains constitutional dimensions.

The fact that a trial court may be well within its discretion in excluding evidence that violates due process standards in civil cases is not without authority. *See* Wright and Graham, Federal Practice and Procedure: Evidence, § 5222, at 312 (1978). Indeed, respondents concede this fact and as part of their Statement of Issues filed in the lower court included the following: "Was the identification procedure establishing Plaintiffs' Decedent's participation in armed robbery not so unnecessarily suggestive as to deny the Decedent due process?"

The courts have uniformly held that the unreasonable use of force by police officers constitutes a denial of due process rights and that an action for damages lies under 42 U.S.C. § 1983. *Basista v. Weir,* 340 F. 2d 74 (3d Cir. 1965); *Roberts v. Trapnell,* 213 F. Supp. 49 (E.D. Pa. 1962); *Brooks v. Moss,* 242 F. Supp. 531 (W.D. S.C. 1965); *McIver v. Russell,* 264 F. Supp. 22 (D. Md. 1967); *Davis v. Turner,* 197 F. 2d 847 (5th Cir. 1952); *Jackson v. Martin,* 261 F. Supp. 902 (N.D. Miss. 1966); *Baxter v. Parker,* 281 F. Supp. 115 (N.D. Fla. 1968); *McArthur v. Pennington,* 253 F. Supp. 420 (E.D. Tenn. 1963); *Selico v. Jackson,* 201 F. Supp. 475 (S.D. Cal. 1962); *Stringer v. Dilger,* 313 F. 2d 536 (10th Cir. 1963); *Morgan v. Labiak,* 368 F. 2d 338 (10th Cir. 1966). 42 U.S.C. § 1983 does

not provide a remedy for common law torts and not all violations of state law rise to the level of a constitutional tort. *Street v. Surdyka,* 492 F. 2d 368, 371 (4th Cir. 1974).

A Civil Rights Action alleging unreasonable use of force by police officers is essentially quasi-criminal in nature. Congress has specifically provided an incentive to plaintiffs' attorneys in their capacity as "private attorneys general" who successfully prosecute such claims in behalf of persons who have been deprived of those federally protected rights which Congress considers to be of the highest priority. *See* the Civil Rights Attorney's Fees Award Act of 1976, P.L. 94-559 (42 U.S.C. § 1988).

This Court in construing 42 U.S.C. § 1983 teaches that the purpose of the act which later became § 1983 is plain from the title of the legislation, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution to the United States, and for other Purposes." *Monroe v. Pape,* 365 U.S. 167, 171 (1961).

There are two basic reasons for excluding identification testimony when the identifications were made under highly suggestive circumstances as in the instant case. First, suggestion by police makes identifications less reliable. Second, exclusion of such testimony is intended to dissuade police from setting up suggestive conditions for identifications because that type of behavior is improper for police, and use of tainted testimony degrades the judicial process. Surely in a § 1983 suit, an action created by Congress to deter police from engaging in certain types of unwanted behavior, those same police should not be allowed to establish a defense by engaging in other forms of unwanted behavior. Suggestive identifications are undesirable when used as a basis for prosecution; certainly they are no less undesirable when used as a basis for a coverup of a police shooting.

The essence of the petitioners' claim is grounded upon the denial of a basic Fourteenth Amendment due process right. The court below held that due process standards governing the admissibility of certain evidence should not apply in this action simply because it is a civil case. The petitioners submit that the conclusion of the lower court is not only logically inconsistent but also violates fundamental fairness. If the very nature of this cause of action seeks the vindication of the denial of due process rights, how can it be properly decided that certain due process standards painstakingly developed by this Court are not applicable? *See, e.g., Manson v. Brathwaite,* 432 U.S. 98 (1977); *Neil v. Biggers,* 409 U.S. 188 (1972); *Simmons v. United States,* 390 U.S. 377 (1968). Are fundamental due process rights and standards to be applied or ignored depending upon the form or cause of action in which a Fourteenth Amendment issue arises? Petitioners contend that such a result is arbitrary and capricious. It is not enough to say that because their decedent is in no jeopardy of prosecution petitioners lack sufficient standing to complain in his behalf of the denial of due process rights and standards attendant to the criminal process. When the gravamen of petitioners' cause of action is directed toward the vindication of the denial of fundamental due process rights, how then can it be correctly argued that petitioners lack the necessary standing to raise the denial of certain due process rights and standards so inextricably wed to the facts and circumstances surrounding their cause of action as to make this very denial of due process a significant part of the cause of action itself? Petitioners submit that the reasoning of the court below is totally unsupportable in logic and in law.

This case presents this Court with a striking opportunity to demonstrate that the due process standards carefully constructed through a long line of cases by the Court designed to proscribe unconstitutional conduct of the part of law enforce-

ment officers are not to be cast aside and trampled upon with impunity by these same law enforcement officers when they find themselves in the position of defendants in an action for deprivation of due process rights. This issue has a potential effect on a great segment of our society as well as all persons currently involved in this type of litigation.

At its inception, the principles underlying the Fourteenth Amendment were heralded as:

> " 'the very spirit and inspiration of our system of government, the absolute foundation upon which it was established.' " *Turpin v. Mailet,* 579 F. 2d 152, 158 (2d Cir. 1978), *cert. den.,* — U.S. —, 99 S. Ct. 586 (1978).

"If the judicial branch has an obligation, independent of Congress, to enforce the terms of any constitutional provision, certainly the fourteenth amendment should be foremost among them." *Id.* at 158.

> " '[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.' " *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 392 (1971) quoting from *Bell v. Hood,* 327 U.S. 678, 684 (1946).

This is, like *Monroe, supra,* one of the few Civil Rights cases to reach the Court which alleges police misconduct and in which the rights of an innocent person are in question. Petition for Certiorari at 11, *Monroe v. Pape, supra.*

This case presents novel issues of great importance and a significant occasion for the Court to expound on the parameters of due process, to reaffirm its basic meaning and extent and to provide guidance in the application of due process standards in the trial of an action brought for the deprivation of constitutionally protected rights.

II.

THERE IS A CONFLICT OF DECISIONS AMONG THE COURTS OF APPEALS RELATING TO THE STANDARD OF REVIEW APPLIED TO EVIDENCE RULE 403 DISCRETIONARY RULINGS OF A TRIAL COURT CONCERNING EXCLUSION OF RELEVANT EVIDENCE ON THE GROUNDS OF UNFAIR PREJUDICE WHICH AFFECTS SUBSTANTIAL RIGHTS.

In the instant case the lower court embarked on an abstruse course in reviewing the trial judge's decision to exclude the proffered circumstantial evidence of Bowden's participation in the robbery after having balanced probative worth against the potential for unfair prejudice as required by Fed. R. Evid. 403.

The lower court decided that the proffered evidence did not relate to a collateral matter, that the evidence would suggest a violent disposition on the part of Bowden, and, more importantly, that it would have shown that Bowden had a motive to resist the defendants (Appendix A at 36). In a case strikingly similar on its facts to the instant case wherein a plaintiff was shot in the back by police, as was Bowden (R. 2-44, 45), the Sixth Circuit in *Stengel v. Belcher,* 522 F. 2d 438 (6th Cir. 1975), *cert. dismissed,* 429 U.S. 118 (1976), in a civil rights action against a policeman who shot and killed two young men and paralyzed a third during a dispute in a cafe, found there was no abuse of discretion in excluding testimony concerning four previous incidents in which the victims allegedly entered bars and caused trouble, including an incident on the same evening in the same bar. The court reasoned that in view of the marginal probative value of some of the proffered testimony, its cumulative nature and its tendency to introduce collateral issues, its exclusion was not impermissible in light of the fact that the primary issue was whether the officer used excessive force, and not who was the first aggressor, particularly where the officer took the stand and related his version of the events, as was so in the instant case.

In the instant case, notwithstanding the proffered identification evidence concerning the deceased, there was utterly no independent evidence presented at trial showing a turbulent nature on the part of Bowden, other than the respondents' own testimony concerning Bowden's actions moments before they killed him. Bowden, who had no criminal record, was totally unknown to the respondents when they approached him.

The lower court next stated that the evidence undoubtedly satisfied the applicable, less exacting test of relevancy under Fed. R. Evid. 401. Petitioners, however, never raised this issue at trial or on appeal nor did they contest it at any time. Indeed, as a prerequisite to the balancing process required by Rule 403 the evidence must be relevant. Rule 403 begins with the words "Although relevant, evidence may be excluded . . . ." In a Rule 403 inquiry the question is not whether the evidence has any tendency to prove the consequential fact but rather how strong a tendency it has to prove that fact. *See* Wright and Graham, Federal Practice and Procedure: Evidence, § 5214, at 271 (1978).

The lower court disposed of the entire Rule 403 issue in two brief sentences as follows:

> "Nor, were prejudice an issue, should the court have invaded the jury's function by assessing credibility. Weighing probative value against unfair prejudice under F. R. Evid. 403 means probative value with respect to a material fact if the evidence is believed, not the degree the court finds it believable. *See* 22 C. Wright and K. Graham, Federal Practice and Procedure: Evidence, § 5214, at 265-66 (1978)" (Appendix A at 37).

If one were to take these two sentences at face value without an examination of the record, all further appellate review

on this issue would necessarily be foreclosed. Curiously, no facts are set forth in support of the bold assertion that the trial judge took it upon himself to usurp the jury's function of assessment of credibility. As the record will reflect, the reason that no facts are set forth in support of the lower court's contention is obvious. There are simply no such facts. Unlike the lower court, the trial court, in order to facilitate appellate review and consistent with the preferred practice, carefully set forth numerous facts in support of its ruling that the probative force of the testimony was outweighed by the danger of unfair prejudice. But the lower court chose to completely disregard those facts. Petitioners submit that in order to reverse the trial court the lower court had no choice but to disregard those facts. It could not contest those facts. They were too strong, too carefully considered by the trial court and totally supportive of the trial court's decision to exclude the proffered evidence. Not once in the many pages of transcript wherein the details of the mechanics of the trial judge's balancing process are set out did the trial judge ever consider the area of credibility (R. 6-2-55). He concerned himself exclusively with probative worth as it was affected by the substantially unreliable identifications (R. 6-21, 22, 23, 24, 31, 32, 37, 43, 52, 55). The record amply reflects that the trial judge's process of balancing probative value against unfair prejudice is a textbook example of the preferred procedure to be followed under Rule 403. He painstakingly set forth facts for the record in support of his conclusions which led to his discretionary exclusion of the evidence. Wright and Graham, Federal Practice and Procedure: Evidence, § 5224 at 318-321 (1978); 1 Weinstein, Weinstein's Evidence, ¶ 403(01)-(03) (1978); 10 Moore's Federal Practice, § 403.02(4) (1976). Actually, not once in the over 3,100 words spoken by the trial judge in weighing the factors, outside of the presence of the jury, consuming some 65 pages of trial tran-

script did he ever use the word "credibility" or any variation thereof (R. 3-46-51, 6-2-55). The respondents conceded in their brief on appeal in the lower court that the trial judge's ruling was reached after weighing probative value against prejudicial effect, concluding that the identifications were not sufficiently reliable (Brief for Appellants at 12). The critical facts weighed by the trial court in deciding to exclude the proffered identification evidence have been enumerated herein in petitioners' Statement of the Case. Of course, the fact that the identification evidence lacked any indicia of reliability, as the trial court concluded, greatly affected its probative value (R. 6-52).

Similarly, there is no support in the record for the lower court's contention that petitioners opened the subject of Bowden's participation in the robbery and hence that the respondents were entitled to rebut the evidence through the testimony of the robbery victims (*see* Appendix A at 37-38). The court stated that there was no point to the testimony that Bowden was seen at his place of employment at the time of the robbery and that he punched out three-quarters of an hour afterwards except to show his innocence. Further, the court stated that in their brief petitioners had suggested no other purpose for the testimony (Appendix A at 38). In fact petitioners had argued that the testimony was admissible on the issue of damages. In addressing this issue in their brief petitioners stated as follows:

> The fact of the matter is that appellees called four witnesses employed by the Boston City Hospital (A. 306, 345, 350, 387). Three of those witnesses testified, among other things, to the fact that Bowden actually went to work on the last day of his life (A. 307, 347, 350). In the course of the testimony of two of those witnesses who were supervisors of Bowden, it was revealed that Bowden was seen by the two witnesses at a time of day

(A. 347, 351) close in time to what we know from other evidence (A. 189, A. E-286) to be the time of the Cambridge robbery, namely, 2:36 p.m. or 2:40 p.m.

. . . .

. . . Notwithstanding the appellants' failure to raise any form of objection to the testimony of the witnesses from the Boston City Hospital, surely the appellants do not now contend that said testimony concerning Bowden's employment was in any way inadmissible. Certainly testimony concerning a decedent's employment is admissible in a death case (Brief for Appellees at 17-18).

Along the same lines the lower court stated that there was no other purpose for the testimony that police, other than the defendants, may have scrambled the getaway car's registration number except to show Bowden's innocence (Appendix A at 38). Petitioners submit that this is a most incredible misstatement of the facts. Petitioners never presented any evidence to the effect that anyone other than the defendants scrambled any number at any time. Rather in the course of laying a foundation to explain the reason why the defendants had occasion to approach Bowden's car it became apparent that the registration number of the getaway car transmitted by the Cambridge police (Pl. Ex. 22A; R. 46) and received by the Boston Police (R. 16) was not, in fact, the registration number on Bowden's car (Pl. Ex. 149; R. 2-121).

An examination of the applicable decisions of the First Circuit, beginning with the decision of the court below, as yet unreported (Appendix A), reveals that no cognizable standard of review of Rule 403 rulings is applied with any degree of consistency in that circuit. In the opinion of one recognized authority, relied on by the lower court in the decision below (Appendix A at 37), the First Circuit is prominently cited as being an appellate tribunal guilty of some of the most conspicuous abuse of Rule 403, variously employing it as a magic

solvent and as a device to duck issues. *See* Wright and Graham, Federal Practice and Procedure: Evidence, § 5223, at 316 (1978). First Circuit decisions involving Rule 403 run the gamut from those cases in which no discernible standard of review is expressed, as in the opinion of the court below (Appendix A), to cases in which the court has stated it would reverse upon a finding of some abuse of discretion. *United States v. Hickey,* 596 F. 2d 1082, 1089 (1st Cir. 1979); *United States v. Fosher,* 590 F. 2d 381, 384 (1st Cir. 1979); *United States v. Fosher,* 568 F. 2d 207, 213 (1st Cir. 1978). These positions notwithstanding, the First Circuit has expressed views respecting Rule 403 to the effect that evidence can be admitted under Rule 403 despite the fact that the Rule is, by its very content, exclusionary in nature. *United States v. Cowden,* 545 F. 2d 257, 268 (1st Cir. 1976), *cert. den.,* 430 U.S. 909 (1977); *United States v. Barrett,* 539 F. 2d 244, 248 (1st Cir. 1976); *United States v. Eatherton,* 519 F. 2d 603, 612 (1st Cir. 1975).

Other decisions of the court purport to set out a standard of review, but in reality do no more than paraphrase the trial judge's balancing function of probative worth against potential prejudice, as required by the text of Rule 403, and, hence, really set no standard at all. *United States v. D'Alora,* 585 F. 2d 16, 21 (1st Cir. 1978); *United States v. Hathaway,* 534 F. 2d 386, 402 (1st Cir. 1976).

In *United States v. Robinson,* 560 F. 2d 507, 515 (2d Cir. 1977) (en banc), the Second Circuit has adopted a standard of review to Rule 403 discretionary rulings of a trial judge whereby the trial judge will be upheld unless he acts "arbitrarily or irrationally," 560 F. 2d at 515. In *Robinson* the en banc court vacated a previous panel decision, 544 F. 2d 611, 618, 619 (2d Cir. 1976), *cert. den.,* 435 U.S. 905 (1978) which had reversed a conviction because the court had found the admission of certain evidence to be error and grounds for rever-

sal in that the probative value of said evidence was substantially outweighed by the danger of unfair prejudice. Rather than apply a standard of review, the *Robinson* panel had erroneously substituted its discretion in place of that of the trial court in balancing probative worth against prejudice. This unfortunate practice has been followed all too frequently throughout other circuits as an examination of relevant decisions cited herein will demonstrate. In *United States v. D'Alora, supra,* 585 F. 2d at 21, the First Circuit in reviewing a Rule 403 discretionary ruling followed a course similar to that of the *Robinson* panel in declaring that, "In this circuit, the test is whether unfair prejudice outweighs its probative value." *Id.* at 21.

The Third Circuit has followed the Second Circuit in its adoption of the arbitrary-irrational standard of review applied to Rule 403 rulings. In *United States v. Long,* 574 F. 2d 761, 767-768 (3d Cir. 1978), *cert. den.,* — U.S. —, 99 S. Ct. 577 (1978), in upholding an arguably improper admission of challenged evidence and relying on the en banc decision in *Robinson,* the court concluded that the trial judge,

> "should not be reversed simply because an appellate court believes that it would have decided the matter otherwise because of a differing view of the highly subjective factors of (a) the probative value, or (b) the prejudice presented by the evidence. This inference is strengthened by the fact that the Rule does not establish a mere imbalance as the standard, but rather requires that evidence 'may' be barred only if its probative value is 'substantially outweighed' by prejudice. The trial judge, not the appellate judge, is in the best position to assess the extent of the prejudice caused a party by a piece of evidence. The appellate judge works with a cold record, whereas the trial judge is there in the courtroom." 574 F. 2d at 767.

The court noted that under the terms of Rule 403 as originally proposed by this Court, exclusion of evidence was mandatory where unfair prejudice was concerned. *Id.*

The Fifth Circuit standard of review as applied to Rule 403 rulings is consistent and readily identifiable. The trial court's ruling will not be disturbed absent a showing of "clear abuse" of discretion. The standard as set forth in the case of *United States v. Brown,* 547 F. 2d 1264, 1266 (5th Cir. 1977) has been regularly followed to the present time. *United States v. Johnson,* 558 F. 2d 744, 746 (5th Cir. 1977), *cert. den.,* 434 U.S. 1065 (1978); *United States v. Herzberg,* 558 F. 2d 1219, 1225 (5th Cir. 1977), *cert. den.,* 434 U.S. 930 (1977); *United States v. Tidwell,* 559 F. 2d 262, 267 (5th Cir. 1977), *cert. den.,* 435 U.S. 942 (1978); *United States v. Grimm,* 568 F. 2d 1136, 1138 (5th Cir. 1978); *United States v. McDaniel,* 574 F. 2d 1224, 1227 (5th Cir. 1978); *Wright v. Hartford Accident & Indemnity Co.,* 580 F. 2d 809, 810 (5th Cir. 1978); *United States v. Frick,* 588 F. 2d 531, 537 (5th Cir. 1979); *United States v. Vitale,* 596 F. 2d 688, 689 (5th Cir. 1979).

The standard of review in the Sixth Circuit is that the trial judge will be reversed on a Rule 403 ruling upon showing of an "abuse" of discretion. *United States v. Brady,* 595 F. 2d 359, 362 (6th Cir. 1979); *United States v. Hajal,* 555 F. 2d 558, 568-569 (6th Cir. 1977), *cert. den.,* 434 U.S. 849 (1977); *Dupuie v. Egeler,* 552 F. 2d 704, 710 (6th Cir. 1977).

A study of the relevant decisions throughout the circuits reveals that approximately one-half of the circuits, some with more consistency than others, have adopted this mere abuse standard.

The Seventh Circuit likewise adopts a standard of review requiring no more than a mere abuse of discretion in order to reverse a trial judge's discretion under Rule 403. *United States v. Serlin,* 538 F. 2d 737, 747 (7th Cir. 1976); *United States v. Harris,* 542 F. 2d 1283, 1317 (7th Cir. 1976), *cert.*

den., 430 U.S. 934 (1977); *United States v. Juarez*, 561 F. 2d 65, 71 (7th Cir. 1977); *United States v. Dolliole*, 597 F. 2d 102, 107 (7th Cir. 1979).

The Eighth Circuit has a mixed standard of review alternating between a mere abuse standard, *United States v. Hall*, 565 F. 2d 1052, 1055 (8th Cir. 1977); *United States v. Peltier*, 585 F. 2d 314, 321-322 (8th Cir. 1978), *cert. den.*, — U.S. —, 99 S. Ct. 1422 (1979); *United States v. Derring*, 592 F. 2d 1003, 1007 (8th Cir. 1979); *United States v. Semaan*, 594 F. 2d 1215, 1217 (8th Cir. 1979), and a standard which is little more than a rehash of the trial court's balancing test and, as such, as earlier mentioned, is no standard at all. *United States v. Maestas*, 554 F. 2d 834, 837 (8th Cir. 1977), *cert. den.*, 431 U.S. 872 (1977); *United States v. Matlock*, 558 F. 2d 1328, 1332 (8th Cir. 1977), *cert. den.*, 434 U.S. 872 (1977); *United States v. Weir*, 575 F. 2d 668, 670 (8th Cir. 1978); *United States v. Bohr*, 581 F. 2d 1294, 1299 (8th Cir. 1978), *cert. den.*, — U.S. —, 99 S. Ct. 361 (1978); *United States v. Kasto*, 584 F. 2d 268, 272 (8th Cir. 1978), *cert. den.*, — U.S. —, 99 S. Ct. 1267 (1979).

The Ninth Circuit, much like the Eighth Circuit, shows a lack of consistency of any demonstrable standard of review. One line of cases merely restates the trial court's balancing function, points to the generous measure of discretion afforded the trial court under Rule 403 and commends the entire issue to the trial judge. *Longenecker v. General Motors Corporation*, 594 F. 2d 1283, 1286 (9th Cir. 1979); *United States v. Sangrey*, 586 F. 2d 1312, 1314, 1315 (9th Cir. 1978).

Another line of Ninth Circuit decisions sets out a mere abuse standard as a prerequisite to reversal. *United States v. Cassasa*, 588 F. 2d 282, 285 (9th Cir. 1978); *United States v. Radlick*, 581 F. 2d 225, 229 (9th Cir. 1978); *United States v. Hearst*, 563 F. 2d 1331, 1349 (9th Cir. 1977), *cert. den.*, 435 U.S. 1000 (1978).[2]

[2] *Compare*, California Evidence Code § 352 where in reviewing the exercise by a trial court of its discretion, an appellate court is not authorized to substitute its judgment for that of the trial judge; relief is available only where the alleged abuse of discretion clearly constitutes a *miscarriage of justice*. (Emphasis added.) *Cain v. State Farm Mut. Auto. Ins. Co.*, 121 Cal. Rptr. 200, 47 Cal. App. 3d 783 (1975).

The applicable standard of review in the Tenth Circuit is that the reviewing court will reverse a discretionary ruling pursuant to Rule 403 upon the showing of a mere abuse of discretion on the part of the trial judge. *Texas Eastern Transmission Corp. v. Marine Office-Appleton & Cox Corp.*, 579 F. 2d 561, 567 (10th Cir. 1978); *Rigby v. Beech Aircraft Company*, 548 F. 2d 288, 293 (10th Cir. 1977).

The District of Columbia Circuit has a clear, consistent and express standard of review of Rule 403 rulings to the effect that the exercise of discretion of a trial court will not be disturbed on appeal save for "grave abuse." *United States v. Kim*, 595 F. 2d 755, 770 (D.C. Cir. 1979) quoting from *United States v. Wright*, 489 F. 2d 1181, 1186 (D.C. Cir. 1973), a pre-Rules case; *Miller v. Poretsky*, 595 F. 2d 780, 783 (D.C. Cir. 1978).

In the instant case, the lower court substituted its own judgment for that of the trial court with respect to the probative value and possible prejudice of the identification testimony. Clearly, that judgment was not the product of careful consideration of the facts of the case. Rather, the poorly worked opinion of the lower court is infused with that court's personal feelings about the case and the people involved. This can most clearly be seen in a series of footnotes to the opinion. After having stated in the body of the opinion that the facts were unusual, the court in a footnote gave an unusual advisory opinion to the respondents on how to better present their final argument at the next trial (Appendix A at 35, note 5, 36, note 7). The court took judicial notice of a fact that would appear to be favorable to respondents despite the fact that it was never raised at trial, never in dispute at any time, and never the subject of a request to take judicial notice by either party (Appendix A at 35, note 4). The lower court indicated that petitioners' counsel during his final argument "harped" upon the fact that Bowden was black, a curious

choice of verb given the identity of the attorney alleged to have harped and the various meanings ascribed to the noun "harp" (Appendix A at 35, note 5). In another of the lower court's unsupportable contentions it stated that at a bench conference the trial judge suggested that Bowden was shot by one of the respondents because he had tried to run over the other (Appendix A at 35, note 6). In fact, the record includes no such suggestion by the trial judge. Finally, the lower court's statement that the fact that Bowden was black, standing alone, seems "a weak reed" to support a deliberate killing is a most incredible pronouncement (Appendix A at 35, note 5). As the trial judge indicated in denying defendants' motion for a directed verdict on petitioners' 42 U.S.C. § 1981 count, the jury could infer that the respondents would not have gone up to a parked car in Wellesley (a predominantly white suburb of Boston) and started firing (R. 3-62). Particularly in view of the past and present racial strife experienced in the City of Boston and in this country, it is inconceivable that the lower court could make such a statement. Petitioners submit that implicit in the jury's verdict was the fact that James Bowden was killed because he was black. Unfortunately, as most informed people realize, Bowden was but one of a multitude of persons who have suffered the same fate. A recent Justice Department report prepared by the Law Enforcement Assistance Administration reviewed what it called "voluminous evidence" of the frequently racist nature of police use of deadly force. The Justice Department report further stated, "[R]ace is such an integral factor in police killings, the very act of denying the existence of racism without supporting documentation is itself racist." National Minority Advisory Council, Law Enforcement Assistance Administration, Police Use of Deadly Force 5 (1978).

The cumulative effect of the lower court's utter disinclination to confront the trial court on the numerous facts set out

in support of its ruling, its gross misstatement of the evidence and its personal preoccupation with the case led to a most erroneous result. The lower court simply substituted its judgment for that of the trial court and actually acknowledged in the body of its opinion that it had done so. In rejecting some of the conclusions of the trial court which led to its ruling and at the same time carefully avoiding any real evaluation and confrontation of the facts in support thereof, the lower court in responding to the trial court's final conclusion that the proferred evidence was overly prejudicial compared with its probative force flatly stated, "This at once, *in our opinion,* understated the importance of the testimony, and overstated the prejudice" (Appendix A at 36) (emphasis added). If any standard of review of a Rule 403 ruling can be culled from the decision of the lower court, it is a substitution standard like that found in *United States v. D'Alora, supra,* certainly the least desirable of the possible standards that can be applied by a reviewing court and the most unfair.

If indeed there was any invasion of the jury function in the instant case as alleged by the lower court (Appendix A at 37), petitioners submit that the invader was not the trial court but rather the court of appeals which overturned the jury's verdict through its invasion of the function of the trial judge who had seen and heard all of the evidence.

At present, some five separate and identifiable differing and conflicting standards of review among the circuits are applied to discretionary rulings of a trial court concerning the exclusion of relevant evidence on the grounds of unfair prejudice pursuant to Fed. R. Evid. 403. There is no Supreme Court case on point. This conflict should not be allowed to remain and develop further. One writer has indicated that the most serious misuses of Rule 403 are to be found in appellate opinions and as a result a bad example is set for trial courts even though trial judges may be more responsible in exercising discretion under the Rule. *See* Wright and Graham, Federal Practice and Procedure: Evidence, § 5223, at 316, 317 (1978). This is amply borne out in a survey of the circuits.

Petitioners urge this Court on the merits to adopt the standard of review specifically enunciated by the better reasoned decisions of the Second and Third Circuits previously cited, namely, that the standard of review to be applied to Rule 403 rulings of a trial court should be based upon a determination as to whether the trial judge acted "arbitrarily or irrationally" and not whether the probative value of the evidence is outweighed, in the opinion of the reviewing court, by the danger of unfair prejudice, nor any other standards an appellate tribunal sees fit to impose. As one authority has suggested, the discretionary rulings of a trial court under Rule 403 should be upheld in all but rare cases of "egregious abuse." 10 Moore's Federal Practice, § 403.02(4) (1976). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." *United States v. Long, supra,* 574 F. 2d at 767 (3d Cir. 1978), adopting the arbitrary-irrational standard of review.

By its very nature Evidence Rule 403 is one of the most significant rules of evidence governing the conduct of a trial, if not *the* most crucial. It has a potential, if not actual, effect on every type of litigant in the entire federal court system as well as on a multitude of litigants in the many state courts which have adopted rules of evidence modeled after the Federal Rules. It has a serious effect on substantial rights of parties. Thus, only this Court can now resolve the present conflict of standards and insure that all persons are afforded uniform rights and concepts of appellate review in all federal courts.

Finally, petitioners submit that the trial court's Rule 403 ruling in the instant case must be upheld if any real standard of review is applied. The record clearly indicates that the trial court carefully considered all relevant material in ruling on petitioners' motion. The court below did not say that the trial judge was guilty of abuse of discretion, let alone clear or

grave abuse, or of acting arbitrarily or irrationally. The reversal by the court below, on this point, can only stand if it is allowed to substitute its own judgment, clearly influenced by personal feelings, for that of the trial court.

III.

Claimed Prejudicial Remarks of Petitioners' Counsel During Summation Were Not Sufficient to Warrant Reversal When Viewed in the Context of the Entire Trial of a Civil Rights Action (42 U.S.C. § 1983) for the Killing of a Black Robbery Suspect by White Police Officers.

If the trial court did not commit reversible error in excluding the proffered evidence, petitioners submit that neither can the comments of petitioners' counsel concerning the nonproduction of evidence of Bowden's participation in the Cambridge robbery during summation be considered to amount to reversible error by any stretch of the imagination (Appendix A at 38-39). Without conceding any error on their part, petitioners submit that said comments when viewed in light of the entire argument of petitioners' counsel taken together with the overwhelming evidence of liability presented at trial cannot be said to have affected substantial rights pursuant to Fed. R. Civ. P. 61. If the comments of petitioners' counsel are deemed to be improper, they amount to no more than a minute spot on a grand tapestry woven with the thread of crushing evidence of liability.

The case of *DeChristoforo v. Donnelly,* 473 F. 2d 1236 (1st Cir. 1973) involved a claim by the petitioner of violation of due process rights on the ground of prejudicial remarks in closing argument by a prosecuting attorney in a first degree murder case, to which remarks defendant's counsel had immediately objected. Petitioners submit that the standards of what constitutes improper argument in such a case would

certainly be stricter than in the instant case where life and liberty are not in jeopardy. The facts as summarized in the opinion indicated that the prosecutor strongly indicated to the jury that the defendant had offered to plead guilty; not only was this totally untrue, but also something which, by the great weight of authority, a jury should not be told even when it is true. *DeChristoforo, supra,* at 1238. Accordingly, the court of appeals reversed and remanded.

On appeal to this Court, the judgment of the lower court was reversed. In an opinion by Mr. Justice Rehnquist expressing the view of six members of the Court, it was held that the prosecutor's remarks, in the context of the entire trial, were not sufficiently prejudicial as to violate defendant's due process rights and require the granting of a new trial. *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974). The Court noted that isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion, not of evidence, do not reach the proportions of the consistent and repeated misrepresentations of a dramatic exhibit as found in the case of *Miller v. Pate,* 386 U.S. 1 (1967) wherein a prosecutor repeatedly described an exhibit in evidence during trial as being bloodstained when he knew full well it was in fact paint stained. Nor did the prosecutor's remarks reach the proportions of the nondisclosure of specific evidence valuable to the accused's defense as in *Brady v. Maryland,* 373 U.S. 83 (1963). *Donnelly, supra,* 416 U.S. at 646-647.

Unlike the defendant's counsel in *Donnelly, supra,* 416 U.S. at 640, respondents in the instant case made no timely objection during petitioners' summation. Such an objection would have put petitioners' counsel and the trial judge on notice concerning the series of comments they alleged to have been prejudicial. Instead, respondents by calculated design waited until after the conclusion of petitioners' argument before they requested curative instructions from the

court. This untimely request, conceded by the respondents to be a deliberate tactic rather than the result of an oversight, put the trial judge and petitioners' counsel at a most unfair disadvantage (R. 52 Arguments). Obviously, as the trial judge indicated (R. 54, 55 Arguments), he could not give the requested curative instruction without giving the jury the impression that there was some evidence that Bowden had participated in the Cambridge robbery, thereby vitiating his earlier exclusionary ruling. By the same token, petitioners' counsel could not take back words once they had been received without objection of any kind. In any event, the trial judge felt that the comments of petitioners' counsel were at most harmless error (R. 55 Arguments).

Petitioners submit that a showing of essential unfairness sufficient to require a reversal must be sustained not as a matter of speculation but as a demonstrable reality. *Buchalter v. New York,* 319 U.S. 427, 431 (1943).

In the instant case the jury was instructed prior to argument that what counsel say is not evidence and is merely an argument as to their version of the facts (R. 2 Arguments). Both counsel presented relatively lengthy closings. Viewing the remarks which respondents claim to be prejudicial in the context of the entire closing argument, as well as in the context of the entire trial, petitioners submit that on the basis of the foregoing together with the precedents cited, said remarks, if they were improper, were at most harmless error within the meaning of Fed. R. Civ. P. 61. Application of the harmless error statute, to the admission or exclusion of evidence and to instructions to juries depends upon whether the evidence in other respects is evenly balanced or one-sided, since error which may be harmless in a one-sided case may be prejudicial in a close one. *Kotteakos v. United States,* 328 U.S. 750, 764 (1946). Petitioners submit that the record will reflect that the instant case was not a close case and was

in fact a one-sided case in every sense of the word and from every reasonable point of view.

Petitioners put in their case-in-chief without any necessity to call the respondents as witnesses. As to each count in their complaint, petitioners prevailed over respondents' motions for directed verdicts grounded on some twenty-nine reasons (R. 3-56-63). In their case-in-chief respondents chose to testify in their own defense and related an account of the events that was so bizarre and incredulous as to stagger the imagination (R. 4-45-164; 5-118-128; 6-56-116; 6-125-184). For example, one of the respondents testified that he shot Bowden at point blank range when Bowden was facing him and pointing a gun at him. When the respondent was then pressed on cross-examination to explain how his bullets hit Bowden in the back and the back of the head, no answer was immediately forthcoming. In one of the trial's most dramatic moments, the respondent hesitated awkwardly before replying that he had "no idea." No further questions were asked of this witness by petitioners' or respondents' counsel (R. 4-164). The ultimate perjury had been committed. The jury observed it and the trial judge observed it; the lower court could never observe it.

In determining whether error, if there was in fact error, was harmless, a reviewing court must necessarily consider what effect the error might have had on the jury. Accordingly, petitioners include the following post-verdict newspaper account of juror interviews, which if it has no other value, will clearly demonstrate that the jury based its verdict on consideration of the evidence presented and the demeanor of the witnesses, especially the police officers while testifying:

> "David T. Cohen, an engineer who lives in Swampscott, was one of the members of the jury that awarded

> the damages to Mrs. Bowden. He thinks she should have gotten more money.
>
> "Cohen said that most of the jury's three hours of deliberation was spent on deciding the amount of the award. There was general agreement that the killing was not justified. No one had to be convinced of that, Cohen said.
>
> " 'The Boston Police Department's own regulations say that deadly force should not be used on a suspect', Cohen said. 'That's all he was, a suspect. No more. The police had both ends of that street blocked off. He couldn't go anywhere. They had no reason to shoot him. No reason at all.'
>
> "Cohen did not believe the officers' testimony that Bowden had a gun and tried to shoot Holland.
>
> " 'That gun showed no scratches, no signs of being thrown across the street. That gun was put there by somebody.'
>
> "Cohen did not believe that Bowden participated in the Cambridge robbery.
>
> " 'Bowden seemed to be the right man in the wrong place at the wrong time', he said.
>
> "Alternate juror Theodore Cederholm of Milton puts the case even more strongly.
>
> " 'The thing that sticks in my mind is that the policemen were a bunch of damn liars.'
>
> " 'What happened that night? I'll tell you what happened. He was black. I don't think that poor black fellow had a chance. They just got out of the car and started shooting.' " The Boston Globe, July 11, 1978, § A at A3, col. 3.

This case will present the Court with an opportunity to reaffirm its prior holdings on the standard of review to be

applied to claimed prejudicial comments of counsel during summation and to redefine those standards as they apply to Civil Rights cases.

Conclusion.

For the foregoing reasons petitioners respectfully request that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Appendix A.

OPINION OF THE COURT OF APPEALS.

United States Court of Appeals
For the First Circuit

No. 78-1177

PATRICIA BOWDEN et al.,
PLAINTIFFS, APPELLEES,
v.
DENNIS McKENNA et al.,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. WALTER JAY SKINNER, *U.S. District Judge*]

Before ALDRICH and CAMPBELL, *Circuit Judges,*
GIGNOUX, *District Judge.**

John L. Keefe, with whom *Joseph W. Glannon,* was not on brief, for appellants.
Lawrence F. O'Donnell, with whom *Michael J. O'Donnell,* and *O'Donnell & O'Donnell,* were on brief, for appellees.

May 9, 1979

ALDRICH, *Senior Circuit Judge.* This 42 U.S.C. § 1983 action[1] for the shooting of a robbery suspect by two policemen — either in cold blood, or in self-defense — is unusual, not merely on its facts, but for the subtle, and ultimately not so subtle, prejudicial way in which it was presented by the plaintiff;[2] for the amount of time devoted to evidence that

* Sitting by designation.

[1] A second count, based on the Massachusetts wrongful death act, presents no additional questions.

[2] Strictly, plaintiffs, the widow and two minor children.

was either irrelevant or prejudicial, and for the exclusion of proper defense evidence, due to a misunderstanding by the court, which heightened the above. None of this means that, on a proper view of the case, a finding for the plaintiff might not be warranted; all of it means that the finding was reached without any such view.

Basically, the case presented a simple issue. At about 2:30 P.M. on January 29, 1975, a small grocery store near Central Square, Cambridge, was robbed by two black men. A description, including that of the getaway car, was given by the victims to the Cambridge police, who sent it out. As a result, at about 6:30 P.M., defendants, two Boston policemen, approached a car suspected of meeting the description in the Mission Hill section of Roxbury in order to interview the driver, Bowden, and thereafter shot and killed him. According to plaintiff, the shooting was immediate and unprovoked. According to defendants, it was because Bowden struck one of them with his car and attempted to kill him.

Much of the early part of the trial was devoted to how the Cambridge police, and then the Boston police, handled the reported registration of the getaway car, investigated whether it had been listed as stolen, and made and kept records. A slight inaccuracy at one point with respect to the registration might have borne on the issue whether Bowden's was the correct car, but none of it detracted from defendants' right to approach him as a suspect, or bore on any other issue.[3] Next, and in this instance bearing solely on the issue whether Bowden was one of the robbers, plaintiff introduced evidence from the Boston City Hospital, where he had been employed, that he was seen there "about 2:30," and that he

[3] The reporting, and a companion even more irrelevant matter, whether defendants' car was coded #841 or 841A, occupied many pages of transcript and could well, as plaintiff's argument suggests, have confused the jury.

punched out at 3:17 P.M. While the important 2:30 evidence[4] was later impeached, this left a presentable claim that Bowden had not, in fact, been involved in the robbery.

Plaintiff then offered testimony which would have warranted (although not necessarily have compelled, even if believed) a finding that defendants approached Bowden's car and, without ado, jointly shot him, though he was unarmed, through the windows from both sides of the car. No evidence was offered to show why defendants would have done this, not even anything about the robbery itself, which, although committed with a handgun, was a small affair with no one hurt, to have excited such animosity.[5]

As against plaintiff's evidence, defendants testified to one of them ordering Bowden to get out of the car, to which he responded by driving against him, knocking him down, and then backing up and endeavoring to run over him, ("cut me in two"); that Bowden then tried to shoot him, and that they both shot Bowden. Again, there was no evidence to explain why Bowden, in turn, should have engaged in such hostile conduct.[6] Defendants, however, sought to introduce such evidence, namely, identification of Bowden as one of the robbers

[4] We may take judicial notice that one could easily have driven from Central Square after the robbery in time to check out at 3:17.

[5] Plaintiff, during final argument, harped upon the fact that Bowden was black, which may have aroused the jury's sympathy, but standing alone, seems a weak reed to support a deliberate killing which, on any basis, it admittedly was. At the same time, not once, in 26 pages of argument, did defendants pose this basic question to the jury. We are constrained to remark that this was but one of a number of such unaccountable omissions.

[6] An interesting suggestion was made by the court at the bench that, in fact, Bowden, on whom no gun was found, did not shoot as alleged, but was shot by one defendant because he had tried to run over the other (if that were true) and that the other, in the dark, and close quarters, mistook who had fired.

by the two storekeepers, but the court excluded it. This exclusion and its consequences produced this appeal.

In a lengthy give-and-take with counsel, the court ultimately rejected defendants' offer of proof in the form of pretrial depositions of the storekeepers, assigning a number of reasons: that the character of the decedent (of being violent) was sought to be shown by a single event; that "a collateral matter" must be shown by "clear and convincing evidence;" and that the evidence was overly prejudicial compared with its probative force, which the court, because of questioning its credibility, believed to be slight. This at once, in our opinion, understated the importance of the testimony, and overstated the prejudice. Indeed, as it turned out, the prejudice was the other way.

In the first place, this was not a collateral matter. Here were two experienced policemen, instructed, as plaintiff was careful to bring out, to make arrests and generally conduct themselves with the least amount of force, but jointly shooting to kill a man they wished to question allegedly simply because he refused to get out of his car. On its face it makes no sense.[7] Defendants sought to make sense by the testimony identifying him as one of the robbers. Not merely would this have suggested a violent disposition, a matter not normally considered collateral in self-defense cases, *United States v. Burks,* D.C. Cir., 1972, 470 F. 2d 432, 434, 437; *see* C. McCormick, Evidence, § 192, at 460-61 (2d ed. 1972); more important, it would have shown that Bowden had a motive to resist the officers. Whether or not the evidence was "clear

[7] Particularly so in this case, although, again, defendants failed to point it out in their argument, because defendants had in the back of their car two newspaper reporters who were researching an article on police procedures. The last thing one would think defendants would want would be a report of a brutal, senseless killing.

and convincing" was beside the point; it undoubtedly satisfied the applicable, less exacting test of relevancy under F. R. Evid. 401.[8] The fact that it also disclosed a prior crime did not render it inadmissible per se because of prejudice. F. R. Evid. 404(b); *see United States v. Stover,* 8 Cir., 1977, 565 F. 2d 1010, 1013-14; *United States v. Haldeman,* D.C. Cir., 1976, 559 F. 2d 31, 88-89, *cert. denied,* 431 U.S. 933; *United States v. Egenberg,* 2 Cir., 1971, 441 F. 2d 441, 443-444, *cert. denied,* 404 U.S. 994; *Reed v. United States,* 9 Cir., 1966, 364 F. 2d 630, 633, *cert. denied,* 386 U.S. 918. Nor, were prejudice an issue, should the court have invaded the jury's function by assessing credibility. Weighing probative value against unfair prejudice under F. R. Evid. 403[9] means probative value with respect to a material fact if the evidence is believed, not the degree the court finds it believable. *See* 22 C. Wright & K. Graham, Federal Practice & Procedure: Evidence, § 5214, at 265-66 (1978). Also, of course, this being a civil case, inapposite are due process standards of reliability governing the admissibility of eyewitness identifications in criminal prosecutions. *Compare, e.g., Manson v. Brathwaite,* 1977, 432 U.S. 98; *Neil v. Biggers,* 1972, 409 U.S. 188; *Simmons v. United States,* 1968, 390 U.S. 377.

Finally, even if it could be thought that Bowden's participation in the robbery was a collateral issue which a court, in its discretion, might conclude to foreclose, plaintiff had already

[8] 401. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

[9] 403. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

introduced the subject and, short of striking that evidence, there could be no stopping. There was no point to the testimony that Bowden was seen at the City Hospital at the time of the robbery, and that he punched out three-quarters of an hour afterwards, except to show his innocence. In her brief, plaintiff argues, "This is simply not the case. The testimony of said witnesses was admissible for all purposes." No other purpose, however, is suggested. Nor was there any other purpose for the testimony that police, other than defendants, may have scrambled the getaway car's registration number. The matter of Bowden's innocence having been opened, defendants were plainly entitled to rebut.

Instead, plaintiff was given unrestricted license to argue her side to the jury. Beginning with the charge that defendants were seeking to place a "perjury frame . . . around James Bowden," plaintiff proceeded,

> "So insofar as James Bowden is concerned, no one ever got on that stand and said he robbed them in Cambridge. Nobody ever got on that stand and said James Bowden robbed them."

Again,

> "Can anyone go up in the jury room and say: "I'm voting for [the defendants] . . . because James Bowden robbed the store in Cambridge? He never did anything in his life."

Again,

> "See, they can't and couldn't bring anyone in from Cambridge and say: He robbed me. They couldn't bring anyone in to say he had a criminal record. They couldn't bring anyone in here in any way, shape, or manner to defame him, so what do we do now? They were willful and wanton . . . ."

Finally, this mounted to a crescendo,

> "There has been not one piece of evidence brought in by this big police force that James Bowden wasn't in the City Hospital. Nobody. Nobody got on that stand and said they're all full of bologna, he wasn't there, he was over in Cambridge holding me up. Stupid, stupid, and willful and wanton."

Actually, the guilt or innocence of Bowden had nothing to do with the case against these defendants, who had adequate cause to question him in any event, and should not have been before the jury at all, unless defendants raised it themselves as part of their defense. Plaintiff correctly points out that defendants did not object to her raising it, but since defendants expected to do so themselves, they might well have concluded that the order of proof was not worth contesting. But whether defendants were wise or not, in no circumstance, having succeeded in excluding the contrary evidence that Bowden was one of the robbers on the ground that it would be unduly prejudicial, could plaintiff turn around and make a broad, emotional appeal to the jury on the ground that he was innocent. A party cannot have it both ways.

Before leaving this matter we deal briefly with a paragraph in plaintiff's brief asserting that defendants "made utterly no objection nor did they take any exception to any rulings of the trial judge which they now claim to have been erroneous," hence there is nothing before us. We can only think that counsel is willing to take a chance that we do not read the record. Fifty pages of side-bar discussion leading to the court's excluding the identification testimony (as if that discussion were not objection enough to save rights under F. R. Civ. P. 46), end with the court's remarks, "Your objections are noted." The record also shows extensive complaint, immediately after plaintiff's argument, to the quoted excerpts, particularly the last.

We may add that even if no objection had been made to the oral argument, plaintiff's making it of itself demonstrated the prejudicial effect on defendants of the exclusion of the testimony. So, too, did a post-verdict newspaper account of juror interviews that plaintiff saw fit to include in her brief, which, not because of its impropriety, but because of its content, we can only regard as a self-inflicted wound.

There must be a new trial.

Appendix B.

JUDGMENT OF THE COURT OF APPEALS.

United States Court of Appeals

For the First Circuit

No. 78-1177.

PATRICIA BOWDEN, ETC., et al.,
PLAINTIFFS, APPELLEES,

v.

DENNIS McKENNA, et al.,
DEFENDANTS, APPELLANTS.

JUDGMENT

Entered: May 9, 1979

This cause came to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

The judgment of the District Court is vacated and the cause is remanded for a new trial. Costs to appellants.

By the Court:
/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Keefe and O'Donnell]

Appendix C.

PLAINTIFFS' MOTION TO CLARIFY JUDGMENT.

United States Court of Appeals

For the First Circuit

No. 78-1177.

PATRICIA BOWDEN, et al.,
PLAINTIFFS, APPELLEES,

v.

DENNIS McKENNA, et al.,
DEFENDANTS, APPELLANTS.

PLAINTIFF'S MOTION TO CLARIFY JUDGMENT

Whereas the plaintiffs in the above action are in the process of preparing a petition for writ of certiorari, plaintiffs move this Honorable Court to clarify its opinion upon which its judgment of May 9, 1979 was entered as follows:

1. Plaintiffs seek clarification of this Court's opinion in order to determine whether this Court vacated the judgment of the District Court and remanded the cause for a new trial on the basis of prejudicial remarks by plaintiffs' counsel in summation.

2. Plaintiffs seek clarification of this Court's opinion in order to determine whether this Court vacated the judgment of the District Court and remanded the cause for a new trial on the basis of the District Court's exclusion of the eyewitness identification of plaintiffs' decedent.

3. Plaintiffs seek clarification of this Court's opinion in order to determine whether this Court vacated the judgment

of the District Court and remanded the cause for a new trial on each of the grounds set forth in paragraphs one and two above.

4. Plaintiffs seek clarification of this Court's opinion to determine whether this Court vacated the judgment of the District Court and remanded the cause for a new trial on a combination of the grounds set forth in paragraphs one and two above, neither one of which standing alone would be sufficient to vacate the judgment and remand the cause for a new trial.

WHEREFORE, plaintiffs pray that this Honorable Court clarify said judgment as requested in the interests of narrowing the issues for further appellate review and with a view towards contributing to judicial economy in the Supreme Court of the United States as well as this Court and others.

Respectfully submitted,

By Their Attorneys,

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Appendix D.

RESPONSE TO PLAINTIFFS' MOTION TO CLARIFY JUDGMENT.

United States Court of Appeals

For the First Circuit

No. 78-1177.

PATRICIA BOWDEN, et al.,
PLAINTIFFS, APPELLEES,

v.

DENNIS McKENNA, et al.,
DEFENDANTS, APPELLANTS.

Response to Plaintiff's Motion
"To Clarify Judgment."

Entered: May 15, 1979

Per Curiam. The judgment is that there must be a new trial. If plaintiff, as the body of the motion indicates, means "clarify the opinion," the court does not deem it ambiguous. However, lest there be any question, the court held that there was prejudicial error in both respects referred to in the motion, each sufficient to require a new trial.

By the Court:
/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Keefe and O'Donnell]